

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

AMERICAN HOSPITAL ASSOCIATION, et al.,

Plaintiffs,

v.

XAVIER BECERRA, et al.,

Defendants,

Case No. 23-CV-1110-P

**DEFENDANTS' CONSENT MOTION FOR AN EXTENSION OF BRIEFING
SCHEDULE ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services; Melanie Fontes Rainer, in her official capacity as Director of the Office for Civil Rights, U.S. Department of Health and Human Services; and the United States of America respectfully request that the Court extend all deadlines for the parties' cross-motions for summary judgment by 7 days. Defendants seek this extension because the Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) expects to issue a revised version of the guidance document that Plaintiffs challenge in this litigation within the next week. The requested extension will allow OCR to finalize and issue the revised guidance, and for the parties to address the updated guidance in their remaining briefs, thus ensuring the Court is considering arguments that relate to operative guidance. Good cause supports this request, to which Plaintiffs consent, for the following reasons:

1. Plaintiffs filed their complaint in this action on November 2, 2023. *See* Compl., ECF No. 1. The complaint challenges an OCR guidance document addressing the use of online

tracking technologies by entities covered by the Health Insurance Portability and Accountability Act (HIPAA). *See* U.S. Dep't of Health & Human Servs., *Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates* (the Bulletin).

2. On December 8, 2023, the parties jointly requested that the Court excuse Defendants from the requirement of filing a responsive pleading to Plaintiffs' complaint and instead set a briefing schedule for cross-motions for summary judgment. *See* ECF No. 20. The Court granted that motion but modified the parties' proposed briefing schedule. *See* ECF No. 22. Plaintiffs filed their motion for summary judgment on January 5, 2024. *See* ECF No. 24.

3. On January 26, 2024, the parties informed the Court that they had begun discussing a potential resolution of this matter without the need for further briefing or judicial intervention. To enable those discussions to progress, Defendants sought with Plaintiffs' consent, and the Court granted, a 30-day extension of all remaining deadlines under the briefing schedule for the parties' cross-motions for summary judgment. *See* ECF Nos. 41, 42.

4. As the end of that 30-day period drew near, the parties were continuing to engage in productive discussions. Accordingly, Defendants requested with Plaintiffs' consent, and the Court granted, an additional 14-day extension of time to enable those conversations to continue. Under that schedule, Defendants' combined opposition and cross-motion for summary judgment and certification of the administrative record are due this Thursday, March 14, 2024; any briefs of amicus curiae in support of Defendants' position are due on March 21, 2024; Plaintiffs' combined reply and opposition to Defendants' motion for summary judgment is due on April 4, 2024; and Defendants' reply is due April 25, 2024.

5. Although counsel for Plaintiffs and counsel for Defendants have continued to confer in good faith to determine whether they could reach a resolution of this matter without the

need for further briefing or intervention of the Court, the parties determined during a March 11, 2024 discussion that they had reached an impasse.

6. Separately, OCR is in the process of revising and updating the version of the Bulletin that Plaintiffs challenge in response to concerns raised by Plaintiffs. Defendants expect that the forthcoming publication of the revised Bulletin will speak to key concerns Plaintiffs raised in their complaint and opening brief, and could moot or significantly alter issues in dispute in this case.

7. Although the content and timing of the agency's announcement are potentially subject to change, OCR has informed undersigned counsel that it expects to issue updated guidance imminently, and no later than March 18, 2024—a week from today. Counsel for Defendants seek just three days beyond that, until March 21, 2024, to update the arguments in Defendants' brief to account for this development.

8. Defendants respectfully submit that, under these circumstances, it would be an inefficient use of judicial and party resources for them to file a summary judgment brief addressing a version of the Bulletin that they expect will be rendered outdated immediately after its filing. Instead, Defendants propose, and Plaintiffs have agreed to, a short extension that will provide OCR time to issue revised guidance anticipated to address issues central to this litigation, and that will provide defense counsel sufficient time to update Defendants' forthcoming brief accordingly.

9. For these reasons, Defendants respectfully request, with Plaintiffs' consent, that the Court extend all deadlines for the parties' cross-motions for summary judgment by 7 days. The modified schedule for the remainder of the briefing on the parties' summary judgment motions would be:

- March 21, 2024: Defendants' combined opposition and cross-motion for summary

judgment and certification of the administrative record;

- March 28, 2024: Any briefs of amicus curiae in support of Defendants' position;
- April 11, 2024: Plaintiffs' combined reply and opposition to Defendants' motion for summary judgment;
- May 2, 2024: Defendants' reply.

A proposed order is attached hereto.

Dated: March 11, 2024

Respectfully submitted,

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/s/ Leslie Cooper Vigen
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CERTIFICATE OF CONFERENCE

I, Leslie Cooper Vigen, hereby certify that, in accordance with Local Rule 7.1(a), I conferred with Hashim M. Mooppan, counsel for Plaintiffs, regarding this Motion via video teleconference and email on March 11, 2024. Mr. Mooppan advised that Plaintiffs consent to the requested relief.

/s/ Leslie Cooper Vigen
LESLIE COOPER VIGEN